CHAPTER II

Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms

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I. THE DEVELOPMENT OF FUNDAMENTAL RULES

1) Since the beginning of international law in the modern sense, the relationship between morals and law attracted the interest of lawyers and philosophers alike. Vitoria, Grotius and Christian Wolff were cited as references for fundamental rules which are higher in authority than law stipulated in treaties or developed in custom.\(^1\) With regard to binding obligations in positive law, the evolution of law with moral or constitutional content has been traced back to the 19th century.\(^2\) The prohibition against slavery and the slave trade, the first Geneva Convention of 1864 and the Hague Conferences on the law of war at the turn of the centuries come to mind. Some international lawyers of that time proclaimed the existence of an international public order which was placed on a higher rank than treaty law.\(^3\) In the era between the two World Wars, this idea was taken up again.\(^4\) However, it was not be-

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4 Alfred Verdross, « Règles générales du droit de la paix », Recueil des Cours 30 (1929-V), 271, at 304; id., “Forbidden Treaties in International Law”, AJIL 31 (1937), 571 et seq.; Friedrich August von der Heydte, “Die Erscheinungsformen des zwischenstaatlichen Rechts:
fore the end of the Second World War that the development of distinct categories of fundamental rules took place.\(^5\)

The Charter of the Nuremberg Military Tribunal and the Charter of the United Nations mark the beginning of a new era. Several projects of the International Law Commission (ILC) provide evidence of a change in paradigm, particularly so the Draft Code of Offences against the Peace and Security of Mankind, the codification of the law of treaties and the long-lasting work on state responsibility.\(^6\) The preparation of the Vienna Convention on the Law of Treaties of 1969 (VCLT) and what are today its Articles 53 and 64 induced a debate on peremptory norms of international law (jus cogens) which has influenced decisions of the International Court of Justice. In the *Barcelona Traction* Case, the Court mentioned for the first time obligations *erga omnes.*\(^7\) Following the Report on State Responsibility by Special Rapporteur Roberto Ago submitted in 1976, the ILC expressed its opinion on the concept of “international crime” which was widely disputed thereafter.\(^8\)

2) After the end of the Cold War era, this development received new impulses, in particular with respect to State responsibility and international criminal law. As to State responsibility, the Iraqi invasion of Kuwait was followed by an unprecedented involvement of the international community in the procedure of processing compensation claims against an aggressor State.\(^9\) The terms of reparation were sketched out in a Security Council Resolution which functioned as a peace treaty between Iraq and the international community. The United Nations Claims Commission was created as a

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\(^6\) More detailed analysis in *op. cit.* (note 5), pp. 36 et seq.

\(^7\) *ICJ Reports* 1970, p. 2, para. 33.
